No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BERNICE PATTERSON,

Petitioner,

vs.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

PENDA D. HAIR
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

HAMPTON L. KENNEDY, III
HARVEY L. KENNEDY
Kennedy, Kennedy,
Kennedy and Kennedy
710 First Union Building
Winston-Salem, N.C. 27101
(919) 724-9267

Attorneys for Petitioner

H. LEE DAVIS, JR.*
CLARENCE E. DESCHAMPS
Hutchins, Tyndall,
Doughton & Moore
115 West Third Street
Winston-Salem, N.C. 27101
(919) 725-6265

Attorneys for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED JULY 17, 1987

CERTIORARI GRANTED OCTOBER 5, 1987

TABLE OF CONTENTS

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

No. C-84-73-WS

BRENDA PATTERSON,

Plaintiff,

vs.

McLEAN CREDIT UNION,

Defendant.

RELEVANT DOCKET ENTRIES

1-25-84	1.	COMPLAINT - with JURY DEMAND.
2-17-84	3.	ANSWER - of defendant.
11-6-84	6.	DEFT'S MOTION FOR SUMMARY JUDGMENT
11-6-84	7.	DEFT'S BRIEF - in support of Motion for Summary Judgment.
12-14-84	11.	PTF'S BRIEF - in response to deft's motion for summary judgment, with attachments.
12-14-84	12.	AFFIDAVIT - Brenda Patterson, in support of

		ptf's brief.
3-14-85	13.	MEMORANDUM OPINION & ORDER - of Judge Ward, that deft's motion for summary judgment is GRANTED as to third cause of action of plaintiff's complaint but in all other respects DENIED.
10-22-85	17.	PTF'S TRIAL BRIEF.
10-22-85	18.	PTF'S PROPOSED JURY INSTRUCTIONS.
10-23-85	19.	DEFT'S TRIAL BRIEF.
10-23-85	20.	DEFT'S REQUEST FOR INSTRUCTIONS.
11-12-85		JURY TRIAL (1st day) held before Jd. Ward in W-S. Betty Julian, Court Reporter.
11-12-85	21.	PTF'S REQUESTED VOIR DIRE QUESTIONS-
11-12-85	22.	JURY STIPULATION - approved by Jd. Ward.
11-12-85	23.	PTF'S PROPOSED VOIR DIRE -
11-12-85	24.	DEFT'S PROPOSED VOIR DIRE-
11-12-85	25.	PTF'S SUPPLEMENTAL TRIAL BRIEF - (see witness and exhibit list)
11-13-85		JURY TRIAL (2nd day)

		continued before Jd. Ward in W-S
11-14-85		JURY TRIAL (3rd day) continued before Jd. Ward in W-S. ORAL MOTION - of deft. for directed verdict at close of ptf's evidence. The Court will allow ptf's claims of discrimination re: promotion and of lay off & subsequent discharge to go forward and other claims are dismissed or merged.
11-15-85		JURY TRIAL (4th day) continued before Jd. Ward in W-S. ORAL MOTION - renewed by ptf. at close of all evidence-for direct verdict, denied.
11-18-85		JURY TRIAL (5th day) continued before Jd. Ward in W-S.
	26.	DEFT'S SUPPLEMENTAL TRIAL BRIEF-
	27.	JURY VERDICT - that ptf. did not discriminate against the ptf. because of her race in violation of 42 USC § 1981 by denying ptf. a promotion received by Susan Howard Williamson or by laying off ptf. 7-19-82 & subsequently discharging ptf.

		ORAL MOTION - of deft. for atty. fees made. The Court will consider and enter a judgment.
11-20-85	28.	JUDGMENT - of Judge Ward: that Pltf. have & recover nothing on her claims against deft. & action is DISMISSED.
11-20-85	29.	ORDER - of Judge Ward: that deft's motion for attys' fees is DENIED.
2-16-86	30.	PTF'S NOTICE OF APPEAL - to the Fourth Circuit Court of Appeals from the judgment of 11-18-85.
3-24-86	32a. -e.	TRANSCRIPT - of Trial 11-12-85 thru 11-18-85 before Judge Ward in Winston - Salem, N.C. filed by Court Reporter Betty P. Julian, in 5 volumes. (in separate expandable folders)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

COMPLAINT

JURISDICTION AND VENUE

1.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(4), 42 U.S.C. Section 1981, and pendent jurisdiction.

2.

The unlawful employment practices alleged below were and are being committed within the State of North Carolina and venue is asserted to be proper in this Court pursuant to 28 U.S.C. Section 1391.

PARTIES

3.

The plaintiff, Brenda Patterson is a black citizen of the United States and is

a resident of Winston-Salem, North Carolina. The plaintiff was employed by the defendant, McLean Credit Union, from May 5, 1972 until July 19, 1982.

4.

The defendant, McLean Credit Union, is and was at all times hereinafter mentioned, a credit union duly organized and existing under the laws of the State of North Carolina. That the defendant maintains a place of business within the City of Winston-Salem, State of North Carolina, and has done so during all relevant times herein.

FIRST CAUSE OF ACTION

5.

The plaintiff, Brenda Patterson, alleges a violation of 42 U.S.C. Section 1981, and offers the following facts to support that charge:

A. The plaintiff was employed by

the defendant, McLean Credit Union, on May 5, 1972. That she was employed at said Company until July 19, 1982.

B. That throughout this time period, plaintiff was an able, capable, and efficient employee of the defendant.

C. That from the time that the plaintiff was employed at the defendant until her termination, she was constantly harassed and was a victim of racial slurs by Robert Stevenson, who was the manager of the defendant. That all times alleged herein, Robert Stevenson was an agent and employee of the defendant and was acting within the course and scope of his employment. That the harassment against the plaintiff by Robert Stevenson also took the form of assigning her an excessive amount of work in an effort to force her to resign from her job.

D. That from the date of her hire

until her termination, the plaintiff was assigned to a clerical job inspite of the fact that she was a college graduate. That white college graduates were not placed in such clerical jobs. That during her employment, vacancies occurred in higher level jobs for which the plaintiff was qualified, but less qualified whites were placed in said positions.

E. That during the one year period immediately prior to her termination, the plaintiff was denied merit increases. That the denial of said merit increases was a part of the racial harassment against the plaintiff by the defendant and was based on race.

F. That on July 19, 1982, the plaintiff was laid off from her employment at the defendant, which subsequently resulted in her termination. That white employees with less seniority and with

less qualifications were not laid off. That the decision to lay off the plaintiff from her employment was made by Robert Stevenson, who was racially biased.

G. That the plaintiff alleges that the above-mentioned facts constitute racial discrimination in job assignment, harassment, wages, and in lay off and termination, and are a violation of 42 U.S.C. Section 1981. That the discrimination against the plaintiff has been continuing from the date she was hired until her lay off and termination.

6.

That as a result of the above-mentioned acts of the defendant, the plaintiff suffered mental anguish and mental and emotional distress, for which plaintiff is entitled to receive special damages.

7.

That the facts alleged in Paragraph 5 constitutes actions by the defendant, which were wilful, wanton, intentional, malicious and in total disregard of the rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

8.

Plaintiff is entitled to recover reasonable attorneys fees for the services of an attorney in these proceedings as provided for in the 1976 Civil Rights Attorneys Fees Awards Act and 42 U.S.C. Section 1981.

SECOND CAUSE OF ACTION

9.

That the plaintiff realleges the facts of Paragraph 5, and incorporates

them by reference herein.

10.

That the above-mentioned acts were intentionally perpetrated against the plaintiff which resulted in the plaintiff suffering mental and emotional distress. That such acts by the defendant constitute intentional infliction of mental and emotional distress.

11.

That the facts alleged above constitute actions by the defendant which were wilful, wanton, intentional, malicious and in total disregard of the rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

THIRD CAUSE OF ACTION

12.

That the plaintiff realleges the

facts of Paragraph 5, and incorporates them by reference herein.

13.

That subsequent to the hiring of the plaintiff by the defendant, Robert Stevenson began to harass the plaintiff by using racial slurs against her, by giving her an excessive amount of work in an effort to force her to resign, and by generally attempting to intimidate her. That Robert Stevenson was racially prejudiced against black employees, and the defendant knew or should have known of his racial prejudice. That employees complained to the defendant about the racial prejudice of Robert Stevenson, and the defendant failed to take any corrective measures. That prior to the time that the plaintiff was terminated from her employment, the defendant knew of the racially prejudiced attitude of Robert

Stevenson against blacks.

14.

That the defendant was careless and negligent in retaining Robert Stevenson as an employee and as a manager of black employees, when the defendant knew or should have known of his racial prejudice against blacks, including the plaintiff.

15.

That as a direct and proximate result of the defendant's negligence in retaining Robert Stevenson as an employee and as a manager of black employees, the plaintiff suffered severe mental and emotional distress, and humiliation, and was also terminated from her employment.

16.

That the facts alleged above constitute negligence by the defendant which was gross, wilful, wanton and intentional and in total disregard of the

rights of the plaintiff. That the defendant should be required to respond in punitive damages on account of said actions.

WHEREFORE, the plaintiff, Brenda Patterson, respectfully prays this Court:

1. In the first cause of action, to order the defendant to make whole the plaintiff for the 42 U.S.C. Section 1981 violations by granting her compensatory damages, including back pay, front pay, lost pension, insurance, profit-sharing, vacation pay, severance pay, and other employee benefits of at least $100,000 and 250,000 in punitive damages.

2. To order the defendant to make whole the plaintiff for mental distress imposed on her and as a result of the aforementioned unlawful acts for damages in the amount of at least $150,000.

3. To order the defendant to

reinstate the plaintiff to the position she would have held absent discrimination.

4. To order the defendant from discriminating against the plaintiff and other blacks in the terms and conditions of their employment in the future.

5. In the second cause of action, that the plaintiff recover judgment against the defendant for intentional infliction of mental and emotional distress in the sum of $250,000 actual damages and $250,000 in punitive damages.

6. In the third cause of action, that the plaintiff recover judgment against the defendant for negligent retention of an employee in the sum of $250,000 actual damages and $250,000 in punitive damages.

7. To grant plaintiff her attorneys' fees, costs and disbursements.

8. To grant such additional relief

as the Court deems just and proper.

9. Plaintiff demands a trial by jury.

This the 25th day of January, 1984.

/s/ Harvey L. Kennedy
Harvey L. Kennedy

/s/ Harold L. Kennedy, III
Harold L. Kennedy, III.
ATTORNEYS FOR PLAINTIFF

OF COUNSEL:

KENNEDY, KENNEDY, KENNEDY AND KENNEDY
710 First Union Building
Winston-Salem, North Carolina 27101
Telephone: (919) 724-9207

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

A N S W E R

The defendant, McLean Credit Union, answering the Complaint, alleges and says:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim against the defendant upon which relief may be granted.

SECOND DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations.

THIRD DEFENSE

The action by the defendant, resulting in the lay-off and termination of employment of the plaintiff, was for good and lawful business reasons having no consideration or regard to race.

FOURTH DEFENSE

Plaintiff exhausted her administrative remedies under Title VII of the Civil Rights Act of 1964. On June 30, 1983, the EEOC issued to the plaintiff a "NOTICE OF RIGHT TO SUE." Plaintiff received said Notice on or about July 5, 1983. Plaintiff failed to institute any civil action against the defendant within ninety days of her receipt of said Notice as required by Title VII.

FIFTH DEFENSE

This action is frivolous, unreasonable and without foundation, and is known by the plaintiff to be such. Accordingly, the defendant is entitled to recover its attorneys' fees incurred in the defense of this action as permitted by 42 U.S.C. Section 1988.

SIXTH DEFENSE

Answering the specific allegations of

the Complaint, the defendant alleges and says:

1.

The existence of the statutes cited in Paragraph 1 of the Complaint is admitted. The remaining allegations in Paragraph 1 of the Complaint are denied.

2.

The existence of the statutes cited in Paragraph 2 of the Complaint is admitted. The remaining allegations in Paragraph 1 of the Complaint are denied.

3.

The allegations of Paragraph 3 are admitted.

4.

The allegations of Paragraph 4 are admitted.

5.

It is denied that the defendant violated 42 U.S.C. Section 1981. The

defendant answers the remaining portions of paragraph 5 as follows:

A. The allegations of Paragraph 5A are admitted.

B. The allegations of Paragraph 5B are denied.

C. It is admitted that Robert Stevenson was the manager of the defendant. The remaining allegations in Paragraph 5C are denied.

D. It is admitted that the plaintiff was assigned to clerical jobs at various times during her term of employment with the defendant. The remaining allegations in Paragraph 5D are denied.

E. It is admitted that during the one-year period immediately prior to the plaintiff's termination that the plaintiff did not receive a merit increase. The remaining allegations of paragraph 5E are

denied.

F. It is admitted that on July 19, 1982 the plaintiff was laid off from her employment with the defendant, said lay-off subsequently resulting in her termination. The remaining allegations of Paragraph 5F are denied.

G. The allegations of Paragraph 5G are denied.

6.

The allegations of Paragraph 6 are denied.

7.

The allegations of Paragraph 7 are denied.

8.

The allegations of Paragraph 8 are denied.

9.

The defendant realleges its answer referred to in paragraph 5 above.

10.

The allegations of Paragraph 10 are denied.

11.

The allegations of Paragraph 11 are denied.

12.

The defendant realleges its answer referred to in Paragraph 5 above.

13.

The allegations of Paragraph 13 are denied.

14.

The allegations of Paragraph 14 are denied.

15.

It is admitted that the plaintiff was terminated from her employment with the defendant. The remaining allegations in paragraph 15 are denied.

16.

The allegations of Paragraph 16 are denied.

WHEREFORE, the defendant, having fully answered the Complaint, prays:

(1) That the plaintiff's action be dismissed and that she recover nothing of the defendant;

(2) That the defendant recover from the plaintiff its reasonable attorneys' fees incurred in the defense of this action for the reason that the plaintiff's action is frivolous, groundless, without foundation and brought in bad faith; and

(3) That the defendant recover its costs.

This the 16th day of February, 1984.

/s/ George E. Doughton Jr.
GEORGE E. DOUGHTON, JR.
Attorney for Defendants

/s/ Kent L. Hamrick

KENT L. HAMRICK
Attorney for Defendants

OF COUNSEL:

HUTCHINS, TYNDALL, DOUGHTON
& MOORE
115 West Third Street
P.O. Drawer 614
Winston-Salem, North Carolina 27102
Telephone: (919) 725-8385

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

[Caption Omitted]

TRANSCRIPT*/ OF COURT'S CHARGE TO THE JURY AND COUNSEL'S OBJECTIONS

[P. 5-3] THE COURT: Ladies and gentlemen, now that you have heard the evidence and argument of counsel, it becomes my duty [P. 5-4] to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating all of the

---

*Page references are to Volume V of the trial transcript, November 18, 1985.

law, but you must consider these instructions as a whole.

Neither are you to be concerned about the wisdom of any rule of law as stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all of the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff and the answer thereto of the [p. 5-5] defendant. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law stated in the instructions of the Court, and arrive at a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair

trial at your hands as a private individual. The law is no respecter of persons: all persons, including corporations, municipalities, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden of proof is on the plaintiff in a civil action such as this, to prove every essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence in the case, then the jury should find for the defendant.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. [p. 5-6] In other words, a preponderance

of the evidence in the case means such evidence as, when compared and considered with that which opposes it, has more convincing force, and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any issue or fact has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Now, although the burden is on the party who asserts the affirmative of an issue to prove his or her claim by a preponderance of the evidence in the case, this rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom

possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after considering all of the evidence in the case, the jurors feel that what is sought to be proved on that issue is more likely true than not true. On the other hand, if the jurors do not believe that what is sought to be proved on that issue is more likely true than not true or cannot determine where the truth lies, the issue must be answered against the party who has the burden of proof.

[p. 5-7] There are, generally speaking, two types of evidence from which a jury may properly find the truth from the facts in the case. One is direct evidence -- such as the testimony of an eyewitness. The other is circumstantial evidence -- the proof of a chain of

circumstances pointing to the existence or non-existence of a certain fact.

As a general rule, the law makes absolutely no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence,

regardless of who may have produced them; and all facts which have been admitted or stipulated; and all applicable presumptions contained in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, [p. 5-8] must be entirely disregarded by you.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence in the case, and must be entirely disregarded by you.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as a witness

testifies. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of human experience.

I am sending the exhibits which have been received in evidence with you as you retire to deliberate your verdict.

You are entitled to see any and all of these exhibits as you consider your verdict.

You have heard evidence about events which occurred prior to January 25, 1981. I instruct you that you may not find the defendant liable for events occurring before January 25, 1981. That is, the plaintiff may not recover for any acts before that date. However, the evidence was offered as background evidence and may be considered by you if you find it to be relevant to the plaintiff's allegations

that she was denied a promotion received by Susan Howard Williamson because of her race, or that she was laid off on July 19, 1982 and subsequently discharged because of her race.

[p. 9-9] Now, the plaintiff has testified regarding her competence to perform her employment with defendant at a level which would meet the defendant's legitimate expectations. An employee may testify about the jobs and tasks she performed for her employer. However, the employee's perception or evaluation of the quality of her work or the legitimacy of her abilities and history as an employee is not relevant. When an evaluation of an employee's work performance and capabilities is a factor in a decision to retain her, transfer her to new responsibilities, or to discharge the employee, it is the perception of the

decision maker -- the employer -- which is relevant.

The plaintiff alleges her claim under Title 42 of the United States Code, Section 1981. That statute provides in part that all persons of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens.

This statute guarantees all persons who are employees the same right to equal opportunity in employment. The rights of whites as well as blacks are protected under this law. This means that decisions made by employers must be free from racial prejudice and discrimination, and that white employees and black employees must enjoy the same rights in the employee--employer relationship. An employee has the right to be free from employment decisions which are based on his or her

race.

[p. 5-10] Now, upon all the pleadings and all the evidence in the case, which consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, there arise certain questions or issues which you, as jurors, are called upon to answer. These issues are as follows:

1. Did the defendant unlawfully discriminate against the plaintiff because of her race, in violation of Title 42 of the United States Code, Section 1981: (a by denying plaintiff a promotion received by Susan Howard Williamson, and (b) by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

2. If defendant did unlawfully discriminate against plaintiff, what amount of compensatory damages, if any, is

plaintiff entitled to recover: (a) for defendant's denying plaintiff the promotion received by Susan Howard Williamson, and (b) for defendant's laying off plaintiff on July 19, 1982 and subsequently discharging the plaintiff?

3. If plaintiff was discriminated against in her employment because of her race, and the defendant's actions in so doing were malicious, wanton, or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from the defendant?

I will now discuss the issues in the same order that they appeared on the form that I just read to you. The first [p. 5-11] issue, again, reads: Did defendant unlawfully discriminate against plaintiff because of her race, in violation of Title 42, United States Code, Section 1981: (a) by denying plaintiff the promotion

received by Susan Howard Williamson, and (b) by laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

The first issue has been divided into two parts, both parts corresponding to an alleged discriminatory employment action by the defendant. Plaintiff has the burden of proof on the first issue. Thus, for plaintiff to establish the affirmative for a part of issue one, she must show by a preponderance of the evidence that defendant committed the discriminatory employment action alleged in that part.

The following instructions apply to both parts of the first issue. For plaintiff to establish that an employment action was unlawful discrimination, the plaintiff must show that the employment action was taken by the defendant because of plaintiff's race. In order to

establish that an employment action was taken by defendant because of plaintiff's race, plaintiff must prove that race was a determining factor in the action. A determining factor is a substantial or motivating reason for the action. There may be more than one reason or factor in a decision to take an employment action, and plaintiff does not have to prove that race was the only reason for the employment action. However, race [p. 5-12] must have been a determining factor. Race is not a determining factor if plaintiff has merely proven that race was a factor that affected the decision to take an employment action. Rather, plaintiff must prove that "but for" defendant's motive to discriminate against her because of her race, defendant would not have taken the employment action. In other words, plaintiff's race must have made a

difference in defendant's decision to take the alleged discriminatory employment action.

I will now discuss or address each part of issue one separately. You will first consider Issue 1(a). Part (a) of Issue 1 relates to plaintiff's contention that the defendant denied plaintiff a promotion because of her race. In order to carry her burden on Issue 1(a), the plaintiff must establish (1) that a promotion was in fact given to Susan Howard Williamson; (2) that the plaintiff had expressed an interest in the promotion, plaintiff may satisfy this requirement by showing that she had expressed a general interest in advancing as opportunities arose within the credit union; and (3) that plaintiff was better qualified for the position received by Susan Howard Williamson than was Susan

Howard Williamson; and (4) that plaintiff was denied the promotion because of her race.

With regard to the fourth requirement, plaintiff offered evidence tending to show that she had not been trained [p. 5-13] for the job of accountant intermediate because of her race and was thus denied the promotion because of her race. Plaintiff offered evidence tending to show that defendant's stated reasons for not promoting plaintiff were not its real reasons but a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that it did not deny plaintiff the promotion because of her race. The defendant offered evidence tending to show that Susan Howard Williamson was chosen for the job of accountant intermediate because plaintiff was not qualified for

the job and was less qualified than Susan Howard Williamson. You should consider all the evidence, direct and circumstantial, to determine whether plaintiff was not promoted because of her race or because of the reasons given by the defendant. In making this determination, you should keep in mind that the ultimate factual question for you to answer is whether the plaintiff was the victim of an unfavorable employment decision because of the defendant's intentional discrimination against her because of her race.

For the plaintiff, Mrs. Patterson, to prevail upon this issue, it is necessary that she satisfy you by a preponderance of the evidence that she was more qualified to receive the promotion to the accountant intermediate position than was Susan Howard Williamson and that McLean's

intentional discrimination against her because of her race was the real [p. 5-14] reason she did not receive the promotion.

If you find by a preponderance of the evidence that plaintiff was not promoted because of her race, you will answer part (a) of Issue 1 "Yes." If you do not so find, you shall answer part (a) of Issue 1 "No." After you have answered part (a) of Issue 1, proceed to consider part (b) of Issue 1.

1(b) relates to plaintiff's contention that she was laid off on July 19, 1982 and subsequently discharged because of her race. An employer has not violated 42 U.S.C. § 1981 if its decision to lay off or discharge an employee was based on good cause. In fact, an employer may lay off or discharge an employee for poor cause or no cause at all, as long as race is not a determining factor in the

employer's decision. An employer has not violated Title 42 U.S.C., Section 1981 simply because it exercised poor business judgment. It is not the jury's role to second guess the defendant's decision to lay off or discharge plaintiff because you may think the decision lacks wisdom or compassion. However, an employer may not lay off or discharge someone because of race; therefore, the jury is to determine only whether the plaintiff was laid off and discharged because of her race.

Plaintiff offered evidence tending to show that the defendant did not treat race neutrally. Plaintiff offered evidence tending to show that defendant laid off and sub[p.5-15]sequently discharged her because of her race. Plaintiff offered evidence tending to show that the defendant's stated reason for laying off and discharging her, which was based on

business decline, was not its real reason but was a pretext for race discrimination. On the other hand, defendant offered evidence tending to show that plaintiff was laid off because of economic conditions which caused a substantial decline in the defendant's business activities and therefore, business judgment necessitated a reduction in the number of employees. Defendant offered evidence tending to show that the plaintiff was chosen as one to be laid off not because of race, but because of non-discriminatory business reasons. Defendant also offered evidence tending to show that such conditions continued and resulted in plaintiff's final discharge because she had not been recalled within six months after her layoff.

You should consider all the evidence to determine whether defendant laid off

and subsequently discharged the plaintiff because of her race or because of its stated reasons. In making this determination, you should keep in mind that the ultimate factual question for you to answer is whether the plaintiff was the victim of an unfavorable employment decision because of the defendant's intentional discrimination against her because of her race.

For the plaintiff, Mrs. Patterson, to prevail upon [p. 5-16] this issue, it is necessary that she satisfy you by a preponderance of the evidence that the decline in business reasons proffered by the defendant, McLean Credit, were pretextual and that the real reason she was laid off and, after six months without recall, terminated, was because of McLean's intentional discrimination against her because of her race.

If you find by a preponderance of the evidence in the case that defendant laid off and subsequently discharged the plaintiff because of her race, you will answer 1(b) "Yes." If you do not so find, you shall answer 1(b) "No."

Issue 2 is made up of two parts, both of which correspond to a part of Issue 1 with the same letter designation. If you have answered either part of Issue 1 "Yes", you will then proceed to consider Issue 2. However, you will only consider those parts of Issue 2 for which your answer to the corresponding part of Issue 1 was "Yes". In other words, for each part of Issue 1 that you have answered "No", you will not answer that part of Issue 2 with the same letter designation. If you answer both parts of Issue 1 "No", do not consider either part of Issue 2, but end your deliberations and return to

the courtroom.

The second issue reads: If defendant did unlawfully discriminate against the plaintiff, what amount of compensatory damages if any, is plaintiff entitled to recover: (a) for [p. 5-17] defendant's denying plaintiff the promotion given Susan Howard Williamson, and (b) for defendant's laying off plaintiff on July 19, 1982 and subsequently discharging plaintiff?

The following instructions apply to both parts of Issue 2. The plaintiff has the burden of proving damages by a preponderance of the evidence. The measure of damages in a case for race discrimination in employment is the actual, monetary damage sustained on account of the wrongful acts plus a reasonable amount to compensate for any emotional harm, embarrassment, anxiety or

humiliation proximately caused by the wrongful acts. If you find that plaintiff was discriminated against because of race, you should award her a sum which will put her in a position as if the unlawful discrimination had never occurred. Therefore, this sum should include the difference between the value of the salary and fringe benefits that the plaintiff would have received if no race discrimination had occurred, and the value of the salary and fringe benefits plaintiff has and will actually receive.

An employee may recover for any consequential damages resulting from unlawful discrimination on account of race. In order for these damages to be recoverable, they must have been proximately caused by the defendant's wrongful act, that is, there must be an actual loss which was foreseeable and

which would have naturally arisen from the employer's actions. Thus, if it is established by a preponderance of the [p. 5-18] evidence that an employee incurred expenses or lost benefits or protection such as insurance policies, annuities, or retirement benefits as a proximate result of unlawful race discrimination, the employee may recover damages for expenses incurred and an amount which will reasonably compensate for the value of such lost benefits.

The plaintiff must mitigate her damages, that is, the plaintiff must take reasonable steps to avoid harm to herself from the defendant's act. For example, the plaintiff must make reasonable efforts to find other similar employment. The defendant has the burden of establishing by a preponderance of the evidence that the plaintiff failed to mitigate damages.

If you find that plaintiff failed to mitigate her damages, then any damage award to the plaintiff must be reduced by the value of the damages that plaintiff could have reasonably avoided. If defendant does not establish that plaintiff failed to mitigate damages, the issue of mitigation will have no effect on the damage award.

Another element of compensatory damages is compensation for emotional harm, embarrassment, anxiety, or humiliation. If you should find that the plaintiff was unlawfully discriminated against and as a result she experienced any emotional harm, embarrassment, anxiety or humiliation, you will award her a sum which will compensate her reasonably for any emotional harm, embarrassment, anxiety, or humiliation [p. 5-19] already suffered by her as the proximate result of

defendant's wrongful acts, and for any such emotional harm, embarrassment, anxiety or humiliation which you find from the evidence in the case that she is reasonably certain to suffer in the future from the same cause. However, any amount you award for future injury must be reduced to its present value because a smaller sum received now is equal to a larger sum received in the future.

There is no fixed formula for evaluating such injuries as emotional harm, embarrassment, anxiety or humiliation. You will determine what is fair compensation for such injuries by applying logic and common sense to the evidence.

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award her only such damages as will reasonably compensate her

for such injury and damage as you find, from a preponderance of the evidence in the case, that she has actually sustained as a proximate result of unlawful discrimination.

You are not permitted to presume damages or to award speculative damages. You are not to be governed by the amount of damages suggested by the parties or their attorneys, but you are to be governed exclusively by the evidence in the case and the rules of law that I give you.

The plaintiff has the burden of proving the damages or injuries, if any, which she sustained as a proximate result [p. 5-20] of unlawful conduct by the defendant.

It is the defendant's burden to prove failure to mitigate damages.

If you reach and consider the parts

of Issue 2, you will only award damages, if any, for such injuries as you find by a preponderance of the evidence were proximately caused by the discriminatory act described in that part and alleged by the plaintiff.

Regarding part (a) of Issue 2, you will award damages, if any, caused only by the defendant's failure to promote the plaintiff. Thus, the measure of damages under part (a) include the additional amount of salary and benefits that plaintiff would have received had she been promoted over the course of the rest of her employment with the defendant and continuing for such time after her lay off as you find plaintiff is entitled to damages. Plaintiff is also entitled to emotional damages, if any, caused by her failure to be promoted over the same period of time. Regarding the time period

after plaintiff's lay off, it is important for you to bear in mind that plaintiff will be compensated under Issue 2(b), if at all, for any loss of her regular salary and benefits and emotional injury caused by her lay off and discharge. It is important for you to bear this in mind as the plaintiff is not entitled to a double recovery, that is, the plaintiff may only recover once for a given injury.

[p. 5-21] In conclusion, regarding Issue 2(a), you should determine from a preponderance of the evidence what amount of money, if any, would reasonably compensate the plaintiff for the damage you find was caused by defendant's denying plaintiff the promotion. Enter the amount in the space provided under part (a). However, if you do not find that the plaintiff incurred damages as a result of being denied the promotion, enter "zero"

in the blank. After you have answered Issue 2(a), proceed to consider Issue 2(b).

Regarding part (b) of Issue 2, you will award damages, if any, caused only by plaintiff's being laid off and subsequently discharged. Thus, the measure of damages under (b) includes the difference between the amount of regular salary and benefits that plaintiff would have received had she not been laid off and discharged and the amount of salary and benefits plaintiff actually received starting from the time of her lay off and running for that period of time for which you find the plaintiff is entitled to damages. Plaintiff is also entitled to damages for emotional harm, embarrassment, anxiety, or humiliation, if any, caused by her lay off and discharge over the same time period. If defendant proves that

plaintiff failed to mitigate damages, any award must be reduced by the amount so proven.

In conclusion regarding Issue 2(b), you should determine from a preponderance of the evidence what amount of [p. 5-22] money, if any, would reasonably compensate plaintiff for the damages you find were caused by her lay off and discharge. Enter the amount in the space provided under part (b) of Issue 2. However, if you do not find that the plaintiff incurred damages as a result of being laid off and discharged, enter "zero" in the blank. If you award damages under 2(a) or (b), or both, proceed to consider Issue 3. If your answer to both 2(a) and (b) is "zero", end your deliberations and return to the courtroom with your verdict.

Issue 3 reads as follows: If plaintiff was discriminated against in her

employment because of her race, and the defendant's actions in so doing were malicious, wanton or oppressive, what amount of punitive damages, if any, is plaintiff entitled to recover from the defendant.

The burden of proof on this issue is on the plaintiff.

If you have awarded the plaintiff either actual or nominal damages, then the law permits you under certain extraordinary circumstances to award the plaintiff punitive damages for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

A jury may, if in the exercise of their discretion they unanimously choose to do so, add to an award of actual or nominal damages such amount as they shall unanimously agree upon to be proper as

punitive or exemplary damages. [p. 5-23] Punitive damages are awarded only if the jury finds that the defendant maliciously, wantonly or oppressively violated plaintiff's rights.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, spite, or grudge, either toward the injured party individually, or toward all persons in one or more groups or categories of which the injured party is a member.

An act or a failure to act is "wantonly" done, if done with actual knowledge that the action is in violation of rights secured by the laws of the United States, or if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is

"oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity.

If you have found that the plaintiff is entitled to punitive damages from the defendant, enter that amount on the verdict form under Issue 3. If you do not so find, enter "zero" under Issue 3. When you have finished your deliberation on damages, return with your verdict to the courtroom.

Now, ladies and gentlemen, the fact that I have instructed you as to the proper measure of damages should not [p. S-24] be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should

find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of a witness, or by the manner in which a witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given. You may believe all that a witness says, or you may believe nothing that a witness says. On the other hand, you may believe a part of what a witness says and disbelieve the remainder of what that same witness says.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends

to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of those matters. Consider also any relation [p. 5-25] each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies and discrepancies in the testimony of different witnesses, or in the testimony of a witness, may or may not cause the jury to discredit such testimony. Two or more persons witnessing

an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you think the testimony of that witness is entitled to receive.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present

testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you [p. 5-26] think the testimony of that witness is entitled to receive.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness's testimony in other particulars; and you may reject all of the testimony of that witness, or give it such credibility as you think it deserves.

Evidence that at some other time a witness, not a party to this action, has said or done something, which is inconsistent with the witness's testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of that witness; but may never

be considered as evidence or proof of the truth of any such statement.

Where, however, the witness is a party to the case, and by such statement, or other conduct, admits some fact or facts against his interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is knowingly done, if done voluntarily or intentionally, and not because of mistake or accident or some innocent reason.

Now, if it is peculiarly within the power of either the plaintiff or the defendant to produce a witness who could give material testimony on an issue in the case, failure to [p. 5-27] call that

witness may give rise to an inference that that witness's testimony would be unfavorable to that party. However, no such conclusion should be drawn by you with regard to a witness who is equally available to both parties, or where the witness's testimony would merely be cumulative.

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner whatsoever any intimation as to what verdict I think you should find. What the verdict shall be is the sole duty and exclusive

responsibility of you ladies and gentlemen of the jury.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. In other words, the verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in [p. 5-28] the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or

effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of reaching a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and be your spokesman here in Court.

A form of a verdict has been prepared for your convenience which bears the caption of the case and includes the issues which I have just read and discussed with you, with a blank space to write in your answer to each of the issues. You will take this form to the jury room and, when you have reached a

unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the verdict form which sets forth the verdict upon which you have unanimously agreed; and then return with the verdict to the courtroom.

• • •

(Jury out)

THE COURT: [p. 5-29] All right, gentlemen, if there are any objections to the Court's instructions to the jury, I'll hear you at this time.

MR. KENNEDY: Your Honor, there is one matter that I would like to call to your attention. At the charge conference in your office on Friday, you had given us how you would charge on the promotion issue. What you charged on today was just a little bit different, and I just wanted to inquire --

THE COURT: Yes. We all agreed, I

believe that we would check further into the law. My check into the law [p. 5-30] revealed, on the promotion issue, it is incumbent upon the plaintiff to show that she was better qualified than the person who actually received it.

MR. KENNEDY: But isn't that in a situation where you've got objective criteria for a particular job and the stated reasons for the promotion, rather than a situation where there are no stated objective criteria for the promotion and it's all so objective. In other words, in a situation where there is no objective criteria for a particular job -- and I think the cases I'm familiar with -- there is a Fifth Circuit case, a Crawford case, there's a case out of the Sixth Circuit against the Ford Motor Company-- indicating that in that situation, where you've got decisions being made on a

subjective basis, that you would not be looking at the standard of more qualified.

THE COURT: Well, I've checked the Fourth Circuit cases and didn't find a 1981 case that addressed the point, but I did find several Title VII cases, and in my opinion, there is no difference between the promotion law, whether it's 1981 or Title VII, and the law in the Fourth Circuit seems to be that in order to make out a prima facie case, you must show that you are better qualified than the person who received it, and I have so instructed the jury.

MR. KENNEDY: I would like, for the purposes of the record, to make an exception to that point.

[p. 5-31] THE COURT: Yes, sir.

MR. KENNEDY: Also at another point in the charge, you indicated something to the effect that it was the employer's

perception of whether a person is qualified and not the employees' perception. I would except to the way that was --

THE COURT: Well, that's well established law. You can except to it so you can try to change it if you want to, but that is accepted law. Any further complaints? Any objections?

MR. KENNEDY: I think that's all.

MR. DOUGHTON: If Your Honor please, we except to the submission of the third issue on punitive damages to the jury and to the instructions the Court gave on the issue, solely for the purpose of the record.

THE COURT: All right; very well.

* * *

MR. KENNEDY: Your Honor, we have one matter that was called to our attention over lunch time, that there is a recent

Fourth Circuit decision that just came out dealing with the shifting burden of proof. Once the plaintiff introduces evidence of racial animus and racial prejudice, the [p. 5-32] burden of proof then shifts to the defendant. I haven't seen that case-

THE COURT: No, I don't believe you ever will, because that isn't what the Supreme Court says. The burden of proof never shifts. The burden of going forward with the evidence, of course, once that's done, switches over to the defendant to show that there are legitimate non-discriminatory reasons, and then you have to go forward to show that it was pretextual.

MR. KENNEDY: I know there was one recent case I'm familiar with in the Fourth Circuit, where they came out and said that the burden of proof shifts if there is proof that there had been a history of

segregation or if there was proof of a recent history of discrimination. That's the Burlington -- I think, Love vs. Burlington School Board case. In that case, they said the burden of proof shifted. Apparently there has been a recent decision since that one, and I don't know exactly what the name of that decision is. It just came down, but I am familiar with that Burlington case that just said the burden of proof shifts to the defendant --

THE COURT: Well, the burden of proof is always on the plaintiff to show the unfavorable employment decision was as a result of -- well, let me say -- a result of plaintiff's race. I think the jury has been properly instructed on that, as I understand the law, so the burden of persuasion is always [p. S-33] with the plaintiff. Bring the jury in.